Supreme Court, U.S.
FILED
AUG 5
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-470

In The
Supreme Court of the United States
October Term, 1987

—o—

FORT WAYNE BOOKS, INC.,
Petitioner,

vs.

STATE OF INDIANA, et al.,
Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

—o—

REPLY BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

—o—

RECEIVED
AUG 6 1988
OFFICE OF THE
SUPREME COURT, U.S.

JOHN H. WESTON*
DAVID M. BROWN
G. RANDALL GARROU
BROWN, WESTON & GARROU

433 N. Camden Drive,
Suite 900
Beverly Hills, CA 90210
(213) 550-7460

Counsel for Petitioner
Fort Wayne Books, Inc.

*Counsel of Record

Lee J. Klein
8252 E. Lansing Rd.
Suite 101
Durand, MI 48429

Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		ii
ARGUMENT		1
I	INTRODUCTION	1
II	THE APPLICABILITY OF FIRST AMENDMENT ANALYSIS TO ASSESS THE IMPACT OF AN ANTI-OBSCENITY STATUTE UPON PROTECTED SPEECH IS BEYOND REASONABLE DISPUTE, AND RESPONDENTS HAVE COMPLETELY FAILED TO MEET THEIR BURDEN OF JUSTIFICATION UNDER THE APPROPRIATE FIRST AMENDMENT STANDARD OF REVIEW	5
III	THE RICO/OBSCENITY ACT'S PROVISIONS FOR PRE-TRIAL SEIZURE, POST-TRIAL FORFEITURE, AND OTHER CIVIL REMEDIES RESTRICTING FUTURE EXPRESSION CONSTITUTE A SCHEME OF PRIOR RESTRAINTS REGARDLESS OF THEIR ASSERTED "CONTENT NEUTRALITY" AND REGARDLESS OF THEIR CHARACTERIZATION AS "SUBSEQUENT PUNISHMENT."	9
IV	RESPONDENTS HAVE ENTIRELY MISREPRESENTED THE REALITIES OF THE RICO/OBSCENITY STATUTE'S CHILLING EFFECT UPON A WIDE RANGE OF PROTECTED EXPRESSION	14
CONCLUSION		19

TABLE OF AUTHORITIES

Page

CASES:

Arcara v. Cloud Books, Inc., 478 U.S. 697, 106 S.Ct. 3172 (1986) 8, 11, 12

Arkansas Writers' Project, Inc. v. Ragland, — U.S. —, 107 S.Ct. 1722 (1987) 5

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 2, 15, 16

Blount v. Rizzi, 400 U.S. 410 (1971) 16

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 7, 17

City of Lakewood v. Plain Dealer Publishing Co., — U.S. —, 108 S.Ct. 2138 (1988) 2

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 9

Council for Periodical Distributors Association v. Evans, 642 F.Supp. 552 (M.D.Ala.1986) 17

Hustler Magazine v. Falwell, — U.S. —, 108 S.Ct. 876 (1988) 15, 17

Jacobellis v. Ohio, 378 U.S. 184 (1964) 16

Jenkins v. Georgia, 418 U.S. 153 (1974) 18

J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482 (9th Cir. 1984) 7

Lovell v. City of Griffin, 303 U.S. 444 (1938) 11

Marcus v. Search Warrants, 367 U.S. 717 (1961) 1

McKinney v. Alabama, 424 U.S. 669 (1976) 16

Miller v. California, 413 U.S. 15 (1973) 1, 15, 16, 17

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) 5

Near v. Minnesota, 283 U.S. 697 (1931) 4, 6, 9, 10, 11, 12, 13

TABLE OF AUTHORITIES—Continued

Page

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 15

Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971) 11

Penthouse International, Ltd. v. McAuliffe, 436 F.Supp. 1241 (N.D.Ga.1977), aff'd. in part and rev'd. in part, 610 F.2d 1353 (5th Cir. 1980) 17

Playboy v. Meese, 639 F.Supp. 581 (D.D.C. 1986) 17

Pope v. Illinois, — U.S. —, 107 S.Ct. 1918 (1987) 16

Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 16

Roth v. United States, 354 U.S. 476 (1957) 1

Smith v. California, 361 U.S. 147 (1959) 15

State v. Walden Book Co., 386 So.2d 342 (La. 1980) 17

United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) 4

United States v. Pryba, 674 F.Supp. 1504 (E.D.Va. 1987) 3, 14

United States v. Sturman (CR-S-87-278, D.Nev. 1987) 3

Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980) 16

CONSTITUTIONAL PROVISIONS:

United States Constitution, First Amendment ..... *passim*

STATUTES:

18 U.S.C. § 1963(a) 4

Indiana Code § 34-4-30.5-2 13

RULES:

Rules of United States Supreme Court, Rule 34.6 4

TEXTS:

Women Against Censorship (V. Burstyn, ed., 1985) 19

Caught Looking: Feminism, Pornography and Censorship (F.A.C.T. Book Committee, 1986) 19

No. 87-470

In The

Supreme Court of the United States

October Term, 1987

FORT WAYNE BOOKS, INC.,

Petitioner,

vs.

STATE OF INDIANA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY BRIEF FOR PETITIONER FORT WAYNE BOOKS, INC.

ARGUMENT

I

INTRODUCTION

The issue in this case is not whether obscenity as currently defined by *Miller v. California,* 413 U.S. 15 (1973), may be regulated or punished. Misconstruing the essential nature of petitioner's facial challenge to the censorial *remedies* imposed by the civil RICO statute for predicate obscenity, respondents raise the shield of *Roth* and *Miller* as if petitioner sought to relitigate the scope of the underlying offense. On the contrary, Petitioner advocates only the well-entrenched principle that the regulation of obscenity requires procedures and remedies narrowly designed to avoid the suppression of non-obscene, protected expression.

Even less is the issue whether the state may punish nonexpressive criminal conduct such as murder and extortion, unfettered by the First Amendment. Respondents disregard the clearly-stated issues by insisting that petitioner challenges the seizure and forfeiture of communicative businesses no matter what the predicate offense, and thus advocates a rule creating "safe havens . . . for investment of the [proceeds] of organized crime." (Brief of Indiana Attorney General, pp. 9-10). Petitioner clearly challenges the statute only in its application to the predicate offense of obscenity.

Accordingly, the crucial issue at stake here is whether, as respondents urge, obscenity may be punished entirely without limitation, with no regard to the effects of the remedy upon protected expression. Respondents' distortion of the true import of this case betrays an awareness that their position is entirely at odds with decades of First Amendment decisions by this Court. *See Roth v. United States,* 354 U.S. 476 (1957); *Marcus v. Search Warrants,*

367 U.S. 717 (1961); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

Respondents ask this Court to alter the entire landscape of First Amendment review, debasing the standard of analysis whenever the state raises a talismanic cry of "racketeering" or some other provocative label for unprotected speech. They ask this Court to reverse the normal presumption of First Amendment protection, at least in the case of "adult bookstores" (to which the statute is not, of course, limited on its face), and to presume the illegality of erotic materials. (See particularly Brief of Respondent Goldsmith, p. 3, attempting to assign petitioner the burden of establishing non-obscenity: "Nothing in the record indicates that these stores . . . distributed any other materials that had any arguably serious . . . value.")[1]

As a corollary, this Court is asked to entrust often zealous, politically-motivated prosecutors with a statute hopelessly overbroad on its face, on the premise that they will not abuse the limitless power it affords them over the wares and even the continued existence of First Amendment businesses. As this Court has just reaffirmed in *City of Lakewood v. Plain Dealer Publishing Co.*, — U.S. —, 108 S.Ct. 2138 (1988), the grant of such unfettered discretion is *inherently* an abuse, and fundamentally at odds with our Constitution.

---

[1] The facts of the Indianapolis litigation are not directly before the Court, but petitioner is compelled to correct misimpressions created by respondent Goldsmith's account. One such inaccuracy is the repeated assertion that no prospective restraints were placed on the Indianapolis bookstores, when in fact the defendant's bookstore, scheduled to open for its first day of business on the day the complaint was filed, remained padlocked for six months pursuant to Goldsmith's complaint.

Most interestingly, just as the Justice Department has launched a vigorous campaign of RICO prosecutions seeking forfeitures of First Amendment businesses for predicate obscenity,[2] the Solicitor General has entered the fray here on behalf of the State in *Sappenfield v. Indiana*, but timorously attempts to avoid the issues of civil forfeiture and other post-trial restraints. However, he does obliquely address the pre-trial issues posed by *Fort Wayne Books:* under the federal RICO Act, the government "as a policy matter, . . . does not seek to restrain books, films, or other bookstore assets prior to conviction in a case involving predicate obscenity" (Brief of Solicitor General, p. 15). Apparently, the government perceives the general unconstitutionality of such pre-trial seizures.

Regarding the post-trial sanctions, the Solicitor General unjustifiably attempts (p. 15, n. 12) to avoid adjudication of their constitutionality by simply asserting that the issue is not before this Court, although the question has been accepted for review by this Court, squarely decided by the Indiana Supreme Court, and fully briefed by all parties. In light of its prosecutorial actions, the government's desperation to avoid the forfeiture issue is quite telling. The Solicitor General's participation here highlights the threat of *even more* draconian RICO penalties for obscenity violations, under the federal parent of Indiana's RICO Act.[3]

---

[2] The Government has actually obtained blanket forfeiture of five communicative businesses in *United States v. Pryba* (CR. No. 87-00208-A, E.D.Va. 1988), and a similar indictment seeking forfeiture is pending in *United States v. Sturman* (CR-S-87-278, D.Nev., filed October 7, 1987).

[3] Contrary to the Solicitor General's assertion that the federal statute "does not prescribe any minimum penalty," the

(Continued on following page)

Respondents and their other amici, although acknowledging the forfeiture issue, go to great lengths to avoid addressing petitioner's facial challenge by narrowly focusing on minute facts of this case which are largely immaterial, and by engaging in sensationalized accounts of alleged "mobster influence," which are completely irrelevant.[4] As in *Near v. Minnesota,* 283 U.S. 697, 708 (1931), petitioner presents a facial challenge: "the statute is . . . unconstitutional under any reasonable construction of its terms." On its face, it threatens and chills Waldenbooks as well as the adult bookstore.

Petitioner does, however, urge this Court's close attention to the egregious facts of the proceedings below, which illustrate the abuses this statute necessarily entails, and dramatize the real issue here: whether existing First Amendment principles limiting the regulation of obscenity will prevail, or be replaced by a radical regime of censorship and self-censorship.

(Continued from previous page)

current Sentencing Guidelines (§ 2E1.1 and § 5A) mandate a 30-37 month term for RICO offenses, without possibility of probation. Criminal RICO forfeiture, moreover, is blanket and *mandatory under* 18 U.S.C. § 1963(a). *See, United States v. Busher,* 817 F.2d 1409 (9th Cir. 1987). In contrast, the base penalty for arson under the Guidelines (§ 2K1.4(a) and § 5A) is 0-6 months.

[4] Petitioner categorically rejects these inflammatory, unsubstantiated allegations as completely beyond the record, factually inaccurate, and entirely irrelevant to this facial challenge. In lieu of a motion to strike these references as burdensome and scandalous pursuant to this Court's Rule 34.6, petitioner will simply note respectfully that Amici American Booksellers Association and the Video Software Dealers Association have not been alleged to be "gangster-controlled" and yet perceive their vital interests to be at stake here.

II

THE APPLICABILITY OF FIRST AMENDMENT ANALYSIS TO ASSESS THE IMPACT OF AN ANTI-OBSCENITY STATUTE UPON PROTECTED SPEECH IS BEYOND REASONABLE DISPUTE, AND RESPONDENTS HAVE COMPLETELY FAILED TO MEET THEIR BURDEN OF JUSTIFICATION UNDER THE APPROPRIATE FIRST AMENDMENT STANDARD OF REVIEW

Because respondents have no answer to petitioner's analysis of the RICO/obscenity statute's invalidity under the First Amendment, their only recourse is to deny the relevance of the First Amendment altogether. The essence of their argument, that the RICO Act has a "content-neutral" or "non-censorial" purpose, *i.e.,* combatting "racketeering" and seizing its "ill-gotten gains," is both inherently illogical and inadequate as a matter of constitutional law to insulate this statute from First Amendment scrutiny.

In the first place, respondents' argument would fail even if one were to concede that the RICO Act as applied to obscenity had no censorial purpose. Although a finding of legislative intent to censor presumptively-protected speech will normally *condemn* legislation under the First Amendment, such censorial intent need not be shown in order to demonstrate a First Amendment violation. *See Arkansas Writers' Project, Inc. v. Ragland,* — U.S. —, 107 S.Ct. 1722 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983). Moreover, respondents' arguments essentially concede, at times explicitly, that this application of the RICO Act amounts to nothing more than an extremely harsh anti-obscenity statute. As such, it must be analyzed under the

constitutional ground rules which have long governed obscenity litigation.

Although a censorial purpose need not be demonstrated, this Court in *Near v. Minnesota* found particularly objectionable the justification advanced by the state that criminal libel statutes did not effect "efficient repression . . . of the evils of scandal." 283 U.S. at 711. Likewise, responderts here betray an underlying censorial motive when they bemoan, explicitly or implicitly, the inefficient operation of ordinary anti-obscenity laws to suppress obscenity, and in fact a much wider range of protected erotic expression. That justification merely underscores the actual effect of the RICO statute, which inevitably operates to stifle a great deal of material never even alleged to be obscene, thus triggering the extremely strict scrutiny of the prior restraint doctrine.

Respondent argues that the entire bookstores, theaters, etc. which may be seized, forfeited and otherwise permanently foreclosed from public discourse are only "incidentally" restrained; they just happen to be included among the "ill-gotten gains of racketeering." This argument ignores two core realities of the RICO Act's operation as an anti-obscenity statute.

It is first of all illogical to characterize as "incidental" the closure of First Amendment businesses which will *necessarily* result from the statute's application to punish expressve conduct. The RICO/obscenity offense, by definition, requires nothing more than two instances of the commercial distribution of materials found to be obscene, presupposing the existence of a First Amendment business "enterprise" which will be subjected to seizure, forfeiture, and the remaining panoply of suppressive RICO

sanctions. Not only does the repressive result necessarily follow in fact; it is furthermore contemplated by the *announced purpose* of the statute in this context—the prospective curtailment of "racketeering," *i.e.*, obscenity. Inherently and by intent, the statute operates to close down First Amendment businesses which have done nothing more than engage in offending expression.

Secondly, there is in fact no requirement under the RICO Act that the forfeitable assets of the targeted "enterprise" have any real nexus at all to the illegal conduct, other than comprising part of that business. The state incorrectly characterizes the assets which may be seized, forfeited, etc. as "ill-gotten gains," although the Indiana Supreme Court has authoritatively construed the statute to authorize seizure by padlocking and corresponding blanket forfeiture. The statute therefore requires no derivative nexus between the dissemination of obscene items and the property which may be seized and forfeited.[5] Only under a hopelessly overbroad "contagion" theory can the state hope to sweep the entire communicative business into this dragnet.

There is, then, no justification independent of the two predicate obscenity violations for the imposition of these draconian, suppressive sanctions. Even a casual reading of respondents' briefs reveals the concession that in essence, RICO as applied here is merely an extraordinary anti-obscenity weapon. This concession is most readily

---

[5] RICO forfeiture is not limited to the proceeds from the unlawful sale of obscene materials. Thus, $5.00 acquired from the rental of two videotapes later determined to be obscene would trigger a total forfeiture of the entire communicative business. *Cf. J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

apparent in respondents' characterization of these RICO civil remedies as "mere punishment," for two counts of commercial obscenity, labelled "racketeering."

The applicability of the usual heightened standards of First Amendment review to this situation, already clearly settled, has recently been reaffirmed in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 106 S.Ct. 3172 (1986).[6] Every member of the *Arcara* Court would have agreed with Chief Justice Burger's acknowledgement that the closure of a bookstore "where it was conduct with a significant expressive element that drew the legal remedy in the first place" would invoke First Amendment scrutiny. 106 S.Ct. 3177. Justice O'Connor's concurrence, also representing a majority of the Court, expressly indicated that the First Amendment would govern a case such as this one, involving expressive predicate conduct. *Id.*

Petitioner has raised a more than colorable claim that this statute violates the First Amendment, demonstrating that these civil remedies for obscenity will inevitably close communicative businesses *in toto*, and otherwise deter protected First Amendment activity by direct injunction and by chilling effect. Therefore, the burden has shifted to the state to justify these impingements upon

---

[6] Understandably, respondents are at great pains to cast petitioner in the role of the bookstore in *Arcara*, but must do so by ignoring the central distinction drawn in that case between expressive and noncommunicative predicate conduct. In his eagerness to equate the two cases, respondent Goldsmith creates an entirely false impression in suggesting that the Indianapolis RICO complaint was premised in part upon "live paid sexual performances" by individual performers as recounted in the supporting affidavit (Brief of Respondent Goldsmith, p. 6). In actuality, alleged obscenity forms the exclusive legal basis of the complaint in *Goldsmith v. 4447 Corporation*, and of course the statute on its face requires no additional, non-expressive illegal conduct to be alleged.

the First Amendment rights of speaker and public alike. *See Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, n.5 (1984). Respondents' insistence that they need not be held to the standards of First Amendment review bears eloquent testimony to their own perceived inability to shoulder that burden.

III

THE RICO/OBSCENITY ACT'S PROVISIONS FOR PRE-TRIAL SEIZURE, POST-TRIAL FORFEITURE, AND OTHER CIVIL REMEDIES RESTRICTING FUTURE EXPRESSION, CONSTITUTE A SCHEME OF PRIOR RESTRAINTS REGARDLESS OF THEIR ASSERTED "CONTENT NEUTRALITY" AND REGARDLESS OF THEIR CHARACTERIZATION AS "SUBSEQUENT PUNISHMENT."

In outright defiance of both logic and precedent, respondents and their amici maintain that the RICO/obscenity Act's pretrial seizure provisions and post-trial civil remedies including blanket forfeiture of First Amendment businesses do not constitute a scheme of prior restraints. Completely mischaracterizing the doctrine of prior restraint as developed by this Court over the past half-century, respondents' arguments represent a back-door attempt to reverse the rule of *Near v. Minnesota*, a case indistinguishable in principle.

Like this petitioner, Near raised a facial challenge to a civil statute which authorized "abatement" of First Amendment activity as redress for prior instances of allegedly unprotected speech; a defamatory periodical could be "wholly abated" as a nuisance. 283 U.S. at 703. Precisely because of this remedy's direct prospective effect of suppressing future, presumptively-protected speech, the Court invalidated the law on its face as a prior restraint.

The Court found the law nonetheless objectionable even if applied to suppress future issues of publications "chiefly devoted" to allegedly unprotected speech, or to defendants who "regularly and customarily" engaged in such expression. *Id.* at 706, 723.

The Indiana RICO Act, creating prospectively-censorial civil sanctions for obscenity, bears an uncanny resemblance to the *Near* statute, which curtailed future speech by equating defamation with "nuisance." Emphasizing the statute's practical "operation and effect" in *Near*, the Court found this type of remedy effectuated "not punishment, in the ordinary sense, but suppression" of the offending publication. Id. at 711. The RICO Act operates in precisely the same manner, *i.e.*, to suppress the offending First Amendment business solely on the basis of prior speech. The only real distinction between the two statutory schemes is not one of kind, but of degree: the RICO Act's remedies are even broader and more repressive. Whether the asserted justification is punishment of the offensive speech, or forestalling the prospect of similar unprotected speech in the future (respondents embrace each rationale in turn at their convenience), this Court has unequivocally decided that direct restrictions upon future presumptively-protected expression represent constitutionally illegitimate means of achieving those ends.

Respondents essentially advance two arguments in their attempt to distinguish these RICO remedies from a classic prior restraint scheme of the *Near* type: the statute is said to be "content neutral," and to inflict "mere punishment" rather than prior restraint.

Respondents again rely upon the statute's "content neutrality" with regard to the protected expression

which may be restrained to justify its seizure and forfeiture. This contention simply misconceives the nature of the prior restraint doctrine, pursuant to which this Court has never found "content neutrality" with respect to the restrained expression to be a saving grace.

Near itself disapproved a statute which authorized abatement of the "scandalous and defamatory" periodical by suppressing future editions without regard to their contents. More recently, this Court in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), held invalid under *Near* a content-neutral injunction which operated "to suppress, on the basis of previous publications, distribution of literature 'of any kind.' " 402 U.S. at 418-419. Likewise, in the licensing context, the Court has consistently invalidated content-neutral restrictions, as in *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (striking down an ordinance forbidding distribution of "literature of any kind" without prior permission). Guided by this precedent, dozens of state and federal jurisdictions have invalidated analogous "nuisance abatement" closures of First Amendment businesses for predicate obscenity offenses, finding the remedy to constitute a prior restraint because of its prospective effect on protected expression, regardless of "content neutrality" as to the restrained speech. (See Petitioner's Brief at 36-38, n. 25.) Indeed, because the censorship of presumptively-protected expression is the essential evil the prior restraint doctrine is designed to prevent, such "content neutrality" only compounds, rather than lessens, the First Amendment violation.

Amicus Morality in Media inaptly cites in this regard the language of *Arcara v. Cloud Books, supra,* 478 U.S. 697, 106 S.Ct. 3172, 3177, n.2 (1986), distinguishing the bookstore closure predicated upon completely non-expres-

sive conduct from a prior restraint, both because no particular materials would be restrained, and because closure was not sought "on the basis of an advance determination that the distribution of particular materials is prohibited." Amicus neglects to note, however, that Chief Justice Burger went on immediately to emphasize that the closure order in *Arcara* had "nothing to do with any expressive conduct at all," a far cry from the censorial sanctions of the RICO Act as applied to punish alleged obscenity by violations. "Content neutrality" as to the restrained materials is immaterial where the prohibited conduct is expression; it does nothing to save the RICO Act with its limitless potential as a tool for censorship.

The state's second argument in attempting to disclaim the civil RICO Act's operation as a prior restraint is no more persuasive. For this purpose, respondents nimbly turn from a prospective focus on eliminating future "racketeering" to the characterization of RICO seizure, forfeiture, etc. as mere "subsequent punishment." Although respondents fail to explain how pre-trial padlocking amounts to "subsequent punishment," or how any of these remedies qualitatively differ in "operation and effect" from the injunction in *Near*, they rely heavily upon this formalistic distinction to stem the tide of First Amendment analysis.

If these civil (or similar criminal) penalties for offensive speech can be deemed "mere punishment" for obscenity, then the *Near* injunction could also be labeled "punishment" for the alleged defamation. Because the sanction in *Near* took the form of an injunction, however, the Court concluded that such a classic restraint upon future expression was directly censorial and "not punishment, *in the ordinay sense.*" 283 U.S. at 711 (emphasis added).

Although *Near* presented "no occasion to inquire as to the permissible scope of subsequent punishment," *id.* at 715, the Court focused realistically upon the remedy's censorial *effects* and certainly would not have hesitated to invalidate a statute forfeiting the offending publishing business to the state. The Court stressed that with regard to such constitutional questions, it would always evaluate "substance and not . . . mere matters of form," *id.* at 709; the state may not achieve an unconstitutional result simply by relabelling the offense or restructuring the remedy. Unquestionably, under *Near*, a remedy which interdicts unprotected speech by closing down an entire periodical, bookstore, video store, or other communicative business is not "punishment in the ordinary sense," but rather "the essence of censorship."

Respondents' various suggestions as to why these remedies do not constitute a prior restraint in practice reflect a stunning insensitivity to our Constitution's guarantees of free speech and press. Oblivious to the censorial impact of civil seizure and blanket forfeiture under the RICO Act, respondent Goldsmith (p. 35) finds RICO's effects "indistinguishable from the effect of a criminal fine." After acknowledging that forfeiture is tantamount to "legal death" (p. 18), Goldsmith proceeds to draw erroneous, facile comparisons with the situation in *Arcara*, asserting that "defendants would be free to engage in expressive conduct in the future at other times and places" (p. 39). In actuality, defendants may be enjoined from doing precisely that, pursuant to I.C. 34-4-30.5-2. Respondents also ignore pre-trial padlocking, and attempt to gloss over the threatened permanent removal of entire inventories of presumptively-protected expressive materials and their means of dissemination. These patent

infringements of First Amendment freedoms destroy both the right of booksellers to offer protected materials and the public's reciprocal right to receive them—surely the forbidden "essence of censorship."

IV

RESPONDENTS HAVE ENTIRELY MISREPRESENTED THE REALITIES OF THE RICO/OBSCENITY STATUTE'S CHILLING EFFECT UPON A WIDE RANGE OF PROTECTED EXPRESSION

In keeping with their central premise that obscenity offenses may be punished without limitation, regardless of the consequences for protected speech, respondents contend that these dire RICO penalties create no cognizable chill of free expression. Unable to refute petitioner's arguments demonstrating the statute's chilling effect, they again deny its constitutional relevance and cavalierly dismiss the statute's potential chill by distorting the prevailing realities of obscenity prosecutions.

Respondents argue that whatever chill flows from these unprecedented sanctions is the "wholly legitimate consequence" of RICO's deterrent effect as an anti-obscenity statute, as the Court said in *United States v. Pryba, supra,* 674 F.Supp. 1504, 1512-13 (1987). RICO statutes are "intended" to have a chilling effect on the distribution of unprotected materials (Brief of Indiana Attorney General, p. 16). Respondents' position that these statutes need not be evaluated with regard to their deterrence of other, *protected* expression makes a mockery of the chilling effect doctrine.

If the federal courts were to adopt a mandatory death penalty for Rule 11 violations, one could predict with some assurance that the incidence of frivolous arguments and

meritless pleadings would fall off dramatically. At the same time, zealous advocacy would correspondingly decline, completely eclipsed by crippling caution. Likewise, the suppression via self-censorship of innumerable protected books, periodicals, videotapes and the like, under the regime of fear RICO's looming shadow creates, represents the overbroad deterrence this Court has deemed too dear a price to pay for the suppression of unprotected speech.

As this Court has recognized in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and subsequent cases including most recently *Hustler Magazine v. Falwell,* — U.S. —, 1008 S.Ct. 876, 880 (1988), protected speech may be impermissibly deterred when unprotected speech is sanctioned by limitless penalties of the type RICO prescribes. The Court's observation in *Smith v. California,* 361 U.S. 147, 154-155 (1959), that "any form of criminal obscenity statute . . . will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene," was hardly meant to approve such deterrence. Rather, the Court in *Smith* invalidated even a minimally punitive misdemeanor obscenity ordinance for its failure to require *scienter* and thus to temper the law's chilling effect. The central teaching which emerges from this Court's decisions in *Smith, N.Y. Times,* and their progeny, suggests that the low threshold of *scienter* now required for obscenity, the inherent imprecision of the concept of obscenity, and these unprecedented, limitless penalties inevitably have the combined effect of widely chilling of protected speech.

This Court has continually recognized, in a long line of cases beginning with *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1963), and continuing well past *Miller*, that

only "a dim and uncertain line" separates protected expression from obscenity.[7] Regardless of whether the *Miller* test has reduced that vagueness problem to a constitutionally tolerable level, the near-impossibility of determining what is obscene in advance of litigation remains an indisputable fact.

Respondents transparently attempt to oversimplify the complexities and unpredictability of obscenity litigation. They repeatedly refer to "serious value," or lack thereof, as if it were the only element of the obscenity test. (See Brief of Respondent Goldsmith, p. 3). (Indeed, if the *Miller* test were so limited to this one element, the comedy of Benny Hill and "elevator music" might well be deemed unprotected expression.) In the same vein, their amici strongly imply that *any* graphic depiction of sexuality may be proscribed. (See Brief of Arizona Attorney General, p. 46; Brief of District Attorney's Association, premised throughout upon the notion that the entire genre of erotic film is a generalized evil which must be eliminated; and Brief of James Clancy, which documents the fare of adult cable television, an immensely popular medium which amicus apparently feels could be effectively eradicated by means of RICO.) Of course, these assertions are starkly in conflict with the decisions

---

[7] The *Bantam Books* language has since been cited in recognition of persistent vagueness problems in *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 311 (1980) (quoting district court decision which it upholds, 404 F.Supp. 33,44); *McKinney v. Alabama*, 424 U.S. 669, 685 (1976) (Blackmun, J., concurring); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971); *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964). The divergent opinions in *Pope v. Illinois*, — U.S. —, 107 S.Ct. 1918 (1987), witness the continuing lively debate regarding obscenity's inherent vagueness.

of this Court.[8] Respondents and their amici disregard completely the rapidly-growing popularity and demonstrably increased acceptance of such candid erotic expression in virtually every community in this country, such that "hard-core" cannot be equated with obscenity, under the *Miller* test.

Respondents persistently assert that no "mainstream" materials of any arguable value are ever prosecuted for obscenity (See Goldsmith, p.28; District Attorneys, pp. 8-12; Clancy, *passim*.). In this regard, petitioner would commend to this Court a close reading of the facts recited in the recent case of *Council for Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D.Ala.1986), along with numerous other reported cases in which zealous prosecutors and other moral crusaders have threatened the censorship of "mainstream" men's magazines such as *Playboy*, *Penthouse* and *Hustler*.[9] These reported cases reveal the tip of a very large iceberg of political pressure currently being exerted upon the entire sphere of erotic speech.

There simply is no "well-marked off" borderline defining obscenity, such that one can cite "Deep Throat"

---

[8] Under the *Miller* test, erotic materials are not obscene unless they not only contain sexually-explicit depictions, but also: (1) appeal to a shameful or morbid, rather than a normal, interest in sex; (2) would be found patently offensive by the average adult in the community; and (3) also lack serious value. *See Brockett v. Spokane Arcades, supra*, 472 U.S. at 501, which reaffirmed that sexually-explicit depictions could not be branded obscene without meeting all three parts of the *Miller* test.

[9] *See Playboy v. Meese*, 639 F.Supp. 581 (D.D.C. 1986); *Penthouse International, Ltd. v. McAuliffe*, 436 F.Supp. 1241 (N.D.Ga. 1977), *aff'd. in part and rev'd. in part*, 610 F.2d 1353 (5th Cir. 1980); *State v. Walden Book Co.*, 386 So.2d 342 (La. 1980).

as "a typical example of a 'hardcore' movie consistently held to be obscene." (District Attorneys, pp. 9,12.) (In fact, that film has been deemed non-obscene in several proceedings, and for years has been a standard film in the inventories of general video stores around the country.) Contrary to respondents' assurances, *Jenkins v. Georgia*, 418 U.S. 153 (1974), does not demonstrate simply that "prosecutions must be limited to 'hard-core' pornography;" it also illustrates the possibility of grave error and the wildcard nature of obscenity prosecutions. Under the regime of RICO, moreover, the exhibitors of "Carnal Knowledge" could have been subjected to pre-trial padlocking of their theater(s), with all their assets under post-trial forfeiture order pending litigation all the way through this Court's ultimate determination of non-obscenity. Undoubtedly, such a prosecution would have brought about their total ruin.

It is small wonder that this case has drawn the avid and concerned participation of Amici American Booksellers Association and Video Software Dealers Association. Their memberships are properly alarmed about the threat of RICO/obscenity prosecutions and the self-censorship that threat imposes. Of course, to respondent's amici, this chill is all to the good, because they would seek the suppression of the widest range of non-obscene sexual speech. Petitioner agrees with their perception that RICO represents a highly effective tool in that campaign of repression.

———o———

CONCLUSION

The First Amendment is designed to protect the free flow of expression and a plurality of opinions in this nation, by insulating controversial sentiments and materials from the vagaries of censorial pressures. Somewhat ironically, in light of the prosecutorial zeal witnessed by this case, sexually-oriented materials are today extremely popular; a great many adults clearly find them desirable as entertainment or otherwise. There is a tremendous diversity of opinion regarding erotic materials, notably among women, including those who consider themselves feminists.[10] Our constitutional framework does not allow for strident, politicized pressure groups to have government enforce their moral views as to the desirability of such widely tolerated, non-obscene materials.

The import of this litigation, however, reaches far beyond the immediate attempts to censor candid treatments of sexuality, that "great and mysterious force in human life, [which] has indisputably been a subject of absorbing interest to [humanity] through the ages; . . . one of the vital problems of human interest and public concern," as this Court noted in *Roth, supra,* 354 U.S. at 487. As evident in *Roth,* this Court has never wavered from the constitutional principle that unprotected speech can be regulated only with due regard for protected speech. Defending a statute which on its face contemplates the pre-trial seizure and post-trial forfeiture of entire bookstores and

---

[10] For a well-articulated feminist advocacy of freedom from censorship of adult, sexually oriented expression, see, e.g., *Women Against Censorship,* (V. Burstyn, ed., 1985); *Caught Looking: Feminism, Pornography and Censorship* (F.A.C.T. Book Committee, 1986).

publishing companies, suppressing non-pornographic and non-obscene erotic materials alike, respondents would remove this essential cornerstone of First Amendment jurisprudence. Petitioner urges the Court to reaffirm this bedrock principle and to strike the statute as applied to obscenity for facial overbreadth, as a prior restraint and for its indirect chill upon the realm of free expression the First Amendment must jealously protect.

DATED: August 6, 1988

Respectfully submitted,

JOHN H. WESTON*
DAVID M. BROWN
G. RANDALL GARROU
BROWN, WESTON & SARNO

433 N. Camden Drive,
Suite 900
Beverly Hills, CA 90210
(213) 550-7460

Counsel for Petitioner
Fort Wayne Books, Inc.

*Counsel of Record

Lee J. Klein
8252 E. Lansing Rd.
Suite 101
Durand, MI 48429

Of Counsel